COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

DECEMBER, NINETEEN HUNDRED AND EIGHT.

NOTES.

RECENT ABERRATIONS IN THE LAW OF CONTINGENT REMAINDERS AT COMMON LAW.—The common law rule that no limitation capable of taking effect in any way as a contingent remainder may be construed as an executory devise, for several centuries invariably applied irrespective of intention, like the rule in Shelley's case, *Carwardine* v. *Carwardine* (1857) 1 Eden 34, has now been reaffirmed in England, *White* v. *Summers* (Ch. Div. 1908) 98 L. T. 845, in spite of the grave doubt cast upon it by recent cases. Earlier it had been applied in cases of limitations to a class, *Doe d. Herbert* v. *Selby* (1824) 2 B. & C. 926; *Festing* v. *Allen* (1843) 12 M. & W. 279, even when to children reaching a certain age "before or after" the death of the life tenant. *Brackenbury* v. *Gibbons* (1876) L. R. 2 Ch. Div. 417. The apparent attack upon the rule originated through class limitations containing the words "before or after." In *Lechmere* v. *Lloyd* (1881) L. R. 18 Ch. Div. 524, these words were construed to create a remainder for children reaching 21 years in time to take as remaindermen, but an executory devise for those who could not take in the first class. The court seemed erroneously to construe the limitation in the light of events as they existed at the time of the life tenant's death; and overlooked the fact that the rule should be

applied if the event *could* have occurred either before or at the termination of the life estate, as well as afterwards. 2 Fearne Cont. Rem. (4th Ed.) 17. The authority of the rule was recognized, but its applicability denied on the ground that there were two distinct classes, one of which could participate only if the gift to them were construed as executory. *Lechmere* v. *Lloyd, supra,* was followed in *Miles* v. *Jarvis,* (1883) L. R. 24 Ch. Div. 633, and in *Dean* v. *Dean,* L. R. [1891] 3 Ch. 150, construing words practically identical. *Blackman* v. *Fysh,* L. R. [1892] 3 Ch. 209, cited as in accord is distinguishable. While the lower court regarded the gift as executory on the authority of the above cases, its decision was sustained on appeal on the perfectly proper ground that the interest was, on a certain event, to take effect by way of interruption.

It is admitted in *Dean* v. *Dean, supra,* that the mere form of the words used does not express a different intention from those in the ordinary case. If these cases stand for the proposition that an emphatic expression of intention will defeat the rule, while a less forcible one will not, the result is to make a rule of law one of construction. But it is contended that, as in the ordinary case, *Festing* v. *Allen, supra,* the class is divided on the life tenant's death into two parts, the members of one of which take remainders, while those of the other do not take at all, the addition of the words "before or after" is an express executory gift to those who cannot take as remaindermen. *Dean* v. *Dean, supra.* Now the event which determines into which class a devisee falls is the death of the life tenant. Those who are thus determined to be remaindermen appear to be entitled to possession, and the interest of the others must then take effect by way of defeasance, as true executory devises. When the first executory devisee becomes of age, his proportionate share of the property will be taken from those in possession, and when another of them fulfills the condition, his share defeats a part of the estate of each one who has come in ahead of him. But the court in *Lechmere* v. *Lloyd, supra,* had no such complicated process in mind. The interests of the remaindermen, who apparently had possession, were merely "liable to open up to let in the two infant children on their fulfilling the conditions of the will." It is submitted that such cannot be the case. Allowing one class to open up to let in members of another, or interests in possession to open up to let in other interests in possession accruing at a later time, are quite different matters from the opening of a class of remaindermen to let in others of the same class. Under this two-class view, a curious result would follow a conveyance by the life tenant with the effect of a fine. Contingent remaindermen who attain 21 before or at the death of the life tenant would be barred, while the others would not, though all were in exactly the same position when the fine was levied, and the testator showed no intention of giving destructible interests to some children and indestructible ones to others.

Alternative gifts by way of remainder and of executory devise are possible. *Doe d. Evers* v. *Challis* (1859) 7 H. L. C. 531. Such would be a gift to all the children, if they all attain 21 before the death of the life tenant, but if none of them do, then to them when they do attain 21, or in case any of them do not, to all when the last attains 21. But the view of the court in *Lechmere* v. *Lloyd, supra,* is not that the children take as one class, but as two classes. If these words can be so construed, any words

indicating an intention that all the children should take, should logically be construed in the same way. The result would be the practical abrogation of the common-law rule as regards class limitations. Fortunately, however, the above cases have been limited to their facts. *Symes* v. *Symes,* L. R. [1896] 1 Ch. 272.

A more startling departure from the old rule is the case of *Battie-Wrightson* v. *Thomas,* L. R. [1904] 2 Ch. 95; cf. 5 COLUMBIA LAW REVIEW 167. A testator by codicil directed that no devisee under his will should have a vested interest until the attainment of the age of 24 years. This was held to create executory interests, because the limitations were not intended necessarily to take effect on the termination of the prior estate. The case can only be upheld by viewing intention as capable of overriding the common-law rule. It may well be argued that the result of the Contingent Remainder Acts are here attained without legislation. Prof. Kales, 21 Law Quar. Rev. 118. A recent case, however, *White* v. *Summers, supra,* limits this case also to its facts. The limitation in the principal case was to the first son who "shall attain, or have attained 21 years," words far more emphatic than those of the preceding case, and apparently the same in meaning as those in *Lechmere* v. *Lloyd, supra. Battie-Wrightson* v. *Thomas, supra,* is distinguished, though unjustifiably, on the ground that alternative limitations were created. Intention, which seems to be the fundamental basis of all the other cases, is entirely discredited by the court as a test for the applicability of the rule. This, it is submitted, is the sound view at common law. If legislation was necessary in the beginning to save contingent remainders, it is not for the courts to extend it to wills specifically excepted by the statute.

ADMIRALTY JURISDICTION AND THE BRINGING IN OF THIRD PARTIES.—The difficulties experienced by the Supreme Court in admiralty causes are attributable to the indefiniteness of the clause, "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." The practice of the English courts at the time of the adoption of the Constitution was early disregarded as a test, *The Vengeance* (1796) 3 Dall. 297, and the jurisdiction exercised by the Colonial and State courts prior to the Constitution declared determinative. *Waring* v. *Clark* (1847) 5 How. 441. Yet, apparently, by the use of both terms "admiralty" and "maritime," the broadest possible grant of jurisdiction was intended. Benedict, Adm. § 188. The words are not synonymous, *The Sandwich* (1806) 1 Pet. Adm. 233n, 234, maritime cases meaning such as are so considered by the maritime law of nations. Benedict, Adm. 40, 41; and see *The Seneca* (1824) Fed. Cases 12670; *De Lovio* v. *Boit* (1815) 2 Gall. 398, 472; *Hale* v. *Ins. Co.* (1842) 2 Story 176, 183. As to jurisdiction, it is submitted that the Supreme Court has practically accepted the general maritime law as a guide. Benedict, Adm. § 162. The adoption of the "nature of the contract" test for contracts, *Ins. Co.* v. *Dunham* (1870) 11 Wall. 1, and the extension of the locality test to include injuries by a vessel to an aid to navigation firmly affixed to the land, point to this conclusion. *The Blackheath* (1904) 195 U. S. 361. Some of the hampering decisions of early judges influenced by the English view of jurisdiction, *The General Smith* (1819) 4 Wheat. 438; cf. *The*